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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 151

SAMUEL GEORGE NILVA, ALBERT GARDNER, MAYFLOWER DISTRIBUTING CO., HERMAN PASTER, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on April 19, 1954.

OPINION BELOW

The judgment of the Court of Appeals held the Act of Jan. 2, 1951 constitutional and affirmed the judgments and sentence rendered by the District Court. It appears in the record at pages 354-355. The opinion of the Court of Ap-

peals appears in the record at pages 338-354, and is reported in 212 F. 2d 115. Memorandum opinions of the District Court are in the record at pages 15-18, 20-22, 312; they are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1954. By an order entered on May 19, 1954 by the Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, time for filing this petition for writ of certiorari was extended to and including June 18, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Is an Act of Congress unconstitutional which attempts either to delegate to the states power that belongs exclusively to it or attempts to make the operation of its law dependent upon the exercise of power by the states which they do not possess?

2. Was the trial court's intimidation of a witness who sought, during the hearing on defendant's motion for a new trial, to correct crucial testimony given by him during the trial, so extreme as to constitute a denial of due process of law and to call for an exercise of the Supreme Court's power of corrective supervision?

3. Do the Courts of Appeals and the District Courts, in determining whether a motion for new trial on ground of newly-discovered evidence shall be allowed, apply rules inconsistent with the views of the Supreme Court?

4. The Johnson Act prohibits the shipment of gambling devices in interstate commerce and requires those making such shipments to file reports thereof which have no purpose and no use other than disclosure of the performance of the forbidden acts. Does the Johnson Act therefore violate the constitutional privilege against self-incrimination?

STATUTES INVOLVED

64 Stat. 1134, 15 USC (Supp. V), §§ 1171-1178.

STATEMENT

On September 19, 1952 an indictment in two counts was filed in the United States District Court for the District of Minnesota. (R. 1-4) The first count charged Samuel George Nilva, Albert Gardner and the Mayflower Distributing Company with the transportation on March 2, 1951, of 38 slot machines from Iowa and Illinois to Minnesota. The second count charged Samuel George Nilva, Albert Gardner and Herman Paster with a conspiracy between January 15, 1951 and March 5, 1951, to transport 38 slot machines from Iowa and Illinois to Minnesota. A motion to dismiss the indictment on the ground of the unconstitutionality of the Johnson Act was made before trial, (R. 10-11) and was denied (R. 15-18). The defendants Nilva and Gardner pleaded not guilty to both counts of the indictment, and the defendants Paster and Mayflower pleaded not guilty to the count with which they were charged, (R. 4).

Laurel J. Carleton was the government's chief witness. He testified, inter alia, that in February 1951 he received a letter from Paster in which Paster requested him to get slot machines that Mayflower Distributing Company could buy. (R. 48) The trial court said that Carleton's receipt of the letter was "the big issue in the case." (R. 266) The jury found the defendants Samuel George Nilva, Albert Gardner, and Mayflower Distributing Company guilty of transporting slot machines as charged in the first count. (R. 226) The jury found Samuel George Nilva and Herman Paster guilty on the conspiracy count. (R. 226) Samuel George Nilva received a sentence of one year and a day on each of the two counts, the sentences to run concurrently. (R. 231) Albert Gardner received a sentence of six months on the first count. (R. 231) Mayflower received a sentence of a fine of $5,000 on the first count. (R. 231)

Paster received a sentence of one year and a day on the conspiracy count. (R. 231)

On March 23, 1953, a motion for a new trial was made on the basis of newly discovered evidence. (R. 238) The affidavit made and filed by the defendants' attorneys in support of the motion recited that Carleton had stated he was not certain whether the letter from Paster requesting him to get slot machines was sent in 1951, as he, Carleton, had testified at the trial, or in 1950 or 1949. (R. 242) (The Johnson Act became effective on January 2, 1951.)

Hearings were held on the motion for a new trial. (R. 243-312) Carleton was examined by counsel and by the trial court. He sought to testify that he could not be sure whether he had received the Paster letter in 1951 or in 1950. Excerpts from the court's interrogation of Carleton are set forth on pages 13 of this petition, in support of petitioners' contention that the court's examination was of such a character as to call for the corrective intervention of this court. The motion for a new trial was denied. (R. 312)

REASONS FOR GRANTING WRIT

I. Section 2 of the Act of January 2, 1951 Is Unconstitutional.

For the first time in the long and vexed history of the Commerce Clause,[1] Congress by Section 2 of the Act of January 2, 1951,[2] the so-called Johnson Act, attempts to permit the states to regulate directly interstate commerce. Congress attempts either to delegate to the states power that belongs exclusively to it or attempts to make the operation of its law dependent upon the exercise of power by the states which they do not possess. Either interpretation renders the Act unconstitutional.

Section 2 of the Act prohibits the interstate shipment of gambling devices,

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[1] Art. I, Sec. 8, Cl. 3 of the Constitution.

[2] 64 Stat. 1134, 15 U.S.C. (Supp. V), § 1172.

> "*Provided,* That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the *exemption* of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the *exemption* of such subdivision from the provisions of this section." (Emphasis supplied)

This section contemplates that the legislature of each state will decide whether it wants gambling devices to come freely into the state without being subject to federal law or whether it wants to forbid their introduction and make such introduction punishable by federal law. If it chooses the former it must pass an act exempting itself from the law passed by Congress, but if it chooses the latter, it need take no action. This choice may be made by the states without regard to whether or not the manufacture, sale or possession of gambling devices violates the states' own penal laws.

Congress, in providing for "exemption" by the states from the operation of its act, either presumes that the states have retained a power to control the entrance of articles of commerce into their borders, which power was in fact granted to Congress by the Commerce Clause, or it attempts to reconvey to the states that self-same power which belongs to it exclusively.[3]

The states would, under this Act, decide whether or not an article of commerce could come over its borders and could determine whether or not a federal penal act should be operative within its borders. If this were countenanced,

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[3] It is the power of Congress, and not of the states, to permit or prohibit the transportation of subjects of commerce into the several states. It is "a domain which the states cannot reach and over which Congress alone has power;" *Hoke* v. *United States*, 227 U.S. 308, 321. Prohibitions of the importation of liquor or milk are equally beyond the power of the states, *Bowman* v. *Chicago & N. W. R. Co.*, 125 U.S. 465; *Leisy* v. *Hardin*, 135 U.S. 100; *Baldwin* v. *Seelig*, 294 U.S. 511.

there would be determination of national policy by the states, which determination is the right and duty of Congress alone. For, as Chief Justice Marshall trenchantly observed in *Wyman* v. *Southward,* 10 Wheat, 1, 48:

> "The state assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the Constitution vests in Congress, and cannot receive it by delegation."

But it is in this very respect that this Act differs from all others dealing with the same kind of problem. Other acts of Congress directed to such problems make their operation dependent simply upon the exercise of the undoubted police power of the states within their own borders. Typical of such other acts in which Congress, and not the states, determined the national policy, is the Ashurst-Sumners Act (49 Stat. 494) which provides:

> "That it shall be unlawful for any person knowingly to transport . . . any goods, . . . produced, . . . by convicts . . . from one State, . . . into any State, . . . where said goods, . . . are intended to be received, possessed, sold, or . . . used, . . . in violation of any law of such State. . . ."

That act, which dealt with the interstate transportation of convict-made goods,[4] and those acts dealing with interstate transportation of liquor,[5] resulted from Congress' policy of protecting states which prohibited the manufacture, sale or possession of such goods, while respecting the rights of those states which considered such goods desirable, thus, assuring harmony among the states.

Each of these Acts was challenged as unconstitutional on the theory that it was an attempt by Congress to delegate to the states its power to regulate interstate commerce. Their constitutionality was sustained in *Re Rahrer* (*Wil-*

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[4] As did the Hawes-Cooper Act (45 Stat. 1084).

[5] The Wilson Act (26 Stat. 313), the Webb-Kenyon Act (37 Stat. 699), and the Reed Amendment (39 Stat. 1069).

kerson v. *Rahrer*), 140 U.S. 545; *James Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311; *United States* v. *Hill*, 248 U.S. 420; *Whitfield* v. *Ohio*, 297 U.S. 431; and *Kentucky Whip & Collar Co.* v. *Illinois C. R. Co.*, 299 U.S. 334; all of which held that the method adopted by Congress in these acts did not constitute a delegation of its commerce power to the states, since the state laws concerned were enacted by the states in the exercise of their police power over their internal affairs. They affirm that the states are without power to control the importation of articles of commerce and that Congress cannot delegate this power to the states.

The distinction between those acts and the Johnson Act, and the reason that they are constitutional and this Act is not, is evident from the opinion of Chief Justice Hughes, construing the Ashurst-Sumner Act in *Kentucky Whip & Collar Co.* v. *Illinois C. R. Co.*, 299 U.S. 334, and the opinion of Chief Justice Fuller in *Re Rahrer*, 140 U.S. 545. Chief Justice Hughes stated:

> "Nor has the Congress attempted to delegate its authority to the States. The Congress has not sought to exercise a power not granted or to usurp the police powers of the States. It has not acted on any assumption of a power enlarged by virtue of state action. The Congress has exercised its plenary power which is subject to no limitation other than that which is found in the Constitution itself. The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection." (p. 352)

The reasoning of Chief Justice Hughes in the *Kentucky Whip* case parallels that of Chief Justice Fuller in *Re Rahrer*, in which he said:

> " . . . Nor can Congress transfer power to a State nor sanction a state law in violation of the Constitution . . . It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State." (p. 560)

> "In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property." (p. 561)
>
> "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws . . . " (p. 564)

These, of course, are but restatements of the well-recognized rule that Congress cannot delegate its authority over interstate commerce, which has found many classic expressions.[6] Even the case that first recognized the right of states to enact laws that might affect interstate commerce where Congress had not preempted the field stated that there could be no delegation of its power by Congress. The Court said in *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299, at 318:

> "If the States were devested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this Act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. . . . "

But in the Johnson Act Congress has deserted the path clearly laid down by the Webb-Kenyon Act and the

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[6] In Gibbons v. Ogden, 9 Wheat, 1, 207, Chief Justice Marshall stated: "Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject." While Mr. Justice Holmes, though dissenting in Knickerbocker Ice Company v. Stewart, 253 U.S. 149, 169, conceded a proposition in harmony with the tenor of the Court's opinion in saying: "I assume that Congress could not delegate to state legislatures the simple power to decide what the laws of the United States should be in that district."

Ashurst-Sumners Act as approved by this Court, and has attempted to delegate this very power over interstate commerce to the states in defiance of every decision of this Court on the subject.[7]

The importance of the cases upholding the Ashurst-Sumners Act and similar acts is not that they point to one method that may be used, but that they point out so clearly that the type of legislation attempted in the Johnson Act is not permissible. They demonstrate that only when both Congress and the states limit their activity to their respective spheres as defined by the Commerce Clause is each exerting power which it possesses. There can be no grant of power from one authority to the other.

The fundamental reason the states cannot act to "exempt" themselves from the operation of this federal statute is that they do not possess the power themselves and it cannot be bestowed on them by the Congress. There must be some source of power to enact a valid law, but none exists in the states for the "exemption" proposed by the Johnson Act. The power that the states originally possessed to regulate the flow of goods over their borders was ceded by them to the Congress in Article I, Section 8, Clause 3 of the Constitution. Their residuum of police power does not contain the power to permit or forbid the passage across their borders of articles of commerce.[8]

Since there is no inherent source of power left to the states to permit or prohibit such flow, the only other pos-

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[7] Of course, the mere fact that one method of solving the problem of controlling the transportation of goods where the states may be of different minds has found the approval of this Court, does not mean that no other constitutional method can be devised. For as Mr. Justice Clark said in his dissent, when other sections of this Act were recently considered by the Court, " . . . the legislative scheme utilized here apparently has not been heretofore attempted. But its novelty should not suggest its unconstitutionality." *United States* v. *Five Gambling Devices*, 346 U.S. 441.

[8] It cannot be doubted that the power to permit and the power to prohibit the transportation of articles of commerce over state borders are all exercises of the single power of control.

sible source would be Congress, where all such power reposes. But, as has been demonstrated, Congress may not delegate its legislative powers. Under the Johnson Act, the states would be authorized to exercise a power that they do not possess to determine whether or not certain goods shall be transported into them, a power that only Congress has.[9]

The Act is not one of general application because a state may act expressly to exempt itself from the federal law. It is not, as under the Webb-Kenyon Act and the Ashurst-Sumners Act, dependent on whether or not a state in the exercise of its police power has passed a law for the control of its own domestic affairs making manufacture, sale or possession of specific goods illegal. It bears no relation to such statutes of a state. It could be made operative by a state in which the devices were legal or inoperative in a state in which they were illegal, depending only on the action or inaction of the state in legislating to exempt itself from the provisions of the federal law. It is thus not in any way dependent upon the exercise of the police power of a state within its borders, but is dependent upon an exertion or refusal to exert a power not found in the state's arsenal of police power. It transcends and exceeds that power and bears no relation to it. It would give to the states a power that relates in no way to the effectiveness of their own laws. It would give to them the power of decision of whether an act committed within its borders

[9] If it be suggested that gambling devices are of that essentially noxious character, such as diseased cattle, etc. whose entry the states may directly forbid in the exercise of their police power, the short answer is that Congress has determined otherwise. It has recognized that like liquor or prison-made goods, states may be of two minds about their desirability. As this Court has said, it is for the Congress and not the states to determine what goods are universally and inherently noxious and what are not, for if the states had this power they would as effectively have control over interstate commerce as if this power had never been granted to Congress by the Constitution. *Leisy* v. *Hardin*, 135 U.S. 100, 114-115.

should be a violation of a federal penal law, without regard to whether such act would be a violation of its own laws. This power no state possesses nor can it receive such power from Congress. That act is unconstitutional which assumes such power in the state or attempts to delegate it to the states.

These petitioners are directly affected by the unconstitutionality of Section 2 of the Act since they were convicted of violating it. It cannot be urged that this Section may validly stand as an absolute prohibition of interstate shipment of gambling devices if the offending clause permitting "exemption" by the states is stricken, for to do so would be to enlarge the scope and operation of the statute. "Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain." *Davis* v. *Wallace*, 257 U.S. 478, 484. That the Act contains a severability clause (Sec. 8) will not permit Section 2 to stand without the offending clause, since the portions of that Section are so interdependent that the entire meaning of the Section will be changed by such excision. Congress cannot be presumed to have so intended. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313; *Williams* v. *Standard Oil Co.*, 278 U.S. 235.

The importance of this case lies in the fact that Congress has, by the Johnson Act, overstepped the boundaries between federal and state powers as defined by the Constitution. That Congress might have achieved a substantially similar result by established constitutional means should not induce this Court to countenance methods that are plainly unconstitutional. Established principles must not be undermined by an act which appears innocuous, but which would be a precedent for any delegation by Congress to the states of its duties and powers or the recognition that there still exists in the states a power of direct control of interstate commerce which this Court has consist-

ently held was surrendered by the states in the Constitution.

II. The District Court's Conduct Constituted a Denial of Due Process of Law And Calls For An Exercise of This Court's Power of Supervision.

At the trial of this cause, Carleton testified that in February 1951, he received a letter from Mayflower Distributing Company signed by Herman Paster in which Paster directed Carleton to purchase slot machines for Mayflower. (R. 48)

The sending of such a letter by Mayflower and Paster in February 1951 would have been strong evidence of guilt. Thus, at the hearing on defendants' motion for a new trial, the trial court said, "I realize perhaps that the conviction in the conspiracy case here was dependent to a very large extent on the testimony of this witness Carleton. He has shaken my confidence in much that he has testified to to convince this jury from what he has said here today and the manner in which he said it." (R. 312) The trial court said further that Carleton's receipt of the letter was "the big issue in the case." (R. 266)

Defendants moved for a new trial on the ground that Carleton was uncertain whether the letter from Mayflower directing the purchase of slot machines was sent in 1950 or in 1951. (R. 240) Since the Act prohibiting the transportation of gambling devices in interstate commerce became effective on January 2, 1951, the sending of the letter in 1950 would bear no connotation of guilt.

Carleton testified at the hearing on the motion for a new trial. The trial court interrogated him at length. The interrogation and comments of the court were more than hostile. They were more than ominous. They were menacing. Thus the court said:

1. "If this man was lying at the trial I want to know it." (R. 265)

2. "I want the United States Attorney to present this matter to the next grand jury." (R. 267)

3. "Mr. Graff, when you and Mr. Murphy came in and first suggested he come in and make a statement I told you then that he could only be telling the truth or an untruth; and if he is now going to contradict what amounts—to what he got those defendants sentenced to prison for, he would have to suffer the consequences; and I haven't got the slightest doubt in my mind that is just what he will have to face." (R. 267)

4. "I think what I told you was that if he lied about Mr. Paster he no doubt would just be putting himself in Mr. Paster's place." (R. 268)

5. The witness having explained that he almost broke down several times while testifying at the trial, the court said, "You didn't appear that way to me. You had better come through with some more clear and explanatory answer than that." (R. 268)

6. The witness having stated that he didn't lie, the court said, "You certainly did if you are changing your story now." (R. 273)

The court's interrogation and threats reduced the witness to virtual incoherency.

Every court must administer the law fairly and must seek the truth fairly. A trial court may interrogate a witness and the interrogation may properly be sharp—perhaps even hostile. But, threats of imprisonment may not be employed by a court to extract from a witness the testimony desired of him or to divert a witness from testimony he seeks to give.

In *Ex Parte Hudgings*, 249 U.S. 378, 63 L. Ed. 656, 39 S. Ct. 337, an original habeas corpus proceeding in this Court, the trial court had stated that it believed petitioner was lying, and that the lying was a contempt for which he would be committed until he had purged himself of the contempt. This Court ordered that the petitioner be discharged. The trial court could not properly control the testimony of the witness by threatening and ordering punishment if the witness persisted in testifying falsely. In

Adler v. *United States,* 182 Fed. 464 (C.A. 5), the court said:

> "The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases."

The words were spoken of the requirement of impartiality before a jury. No lesser measure of impartiality ought ever to be permitted in the court's interrogation of a witness. A court must not exert pressure which will crush a witness and render him subservient to the court.

The Supreme Court has said that it "has the responsibility to supervise the administration of criminal justice by the federal judiciary", and that this responsibility includes the duty to see that the laws are enforced by fair proceedings. *Rosenberg* v. *United States,* 346 U.S. 273, 93 L. Ed. 1607, 73 S. Ct. 1152. The interrogation by the trial court here was not calculated to ascertain truth. Its effect was to intimidate the witness so he would withhold the testimony he sought to give—testimony the court itself acknowledged was of crucial importance. The Court's action prevented the jury from hearing the truth about the issue on which their verdict rested. This is a denial of due process. This court should declare the impropriety of such conduct by a district court. For such conduct is more than improper and more than erroneous. It constitutes so extreme a departure from the proper administration of criminal justice as to call for the corrective intervention of the Supreme Court.

III. The Courts of Appeals And The District Courts, In Determining Whether a Motion For New Trial On Ground of Newly Discovered Evidence Shall Be Allowed, Apply Rules Inconsistent With The Views Of The Supreme Court. The Eighth Circuit Applied a Rule Inconsistent With The Views of This Court.

The Court of Appeals for the Eighth Circuit as well as Courts of Appeals for other circuits have approved a standard to be applied in considering motions for new trial which is in conflict with the rule laid down by this court.

In the instant case, the Court of Appeals held that a new trial should not be granted unless the newly-discovered evidence "is of such probative force and character that its introduction would probably result in a verdict for the party seeking a new trial." (R. 353) This same rule is applied in other Courts of Appeals despite the pronouncement of the Supreme Court in the *Griffin* case. *Heald* v. *U. S.*, 175 F. 2d 878 (C.A. 10, July, 1949); *Thompson* v. *U. S.*, 188 F. 2d 652 (C.A. D.C., March, 1951); *Brandon* v. *U. S.*, 190 F. 2d 175 (C.A. 9, August, 1951); *U. S.* v. *On Lee*, 201 F. 2d 722 (C.A. 2, Feb., 1953); *Saunders* v. *U. S.*, 197 F. 2d 685 (C.A. D.C., June, 1952).

The rule approved by this court as expressed in *Griffin* v. *U. S.*, 336 U. S. 704, is:

> "* * * whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

Mr. Justice Murphy (dissenting on another ground) in explicating the views of the Court, stated:

> "It is clear that this evidence might change the jury's verdict. To make admissibility depend upon mechanical and often illogical variations in the size of the doubt in a judge's mind is an invasion of the jury's function . . .
>
> "If the evidence is admissible, a motion for a new trial should be granted. A contrary determination

would be an *abuse of discretion, for there is manifestly a reasonable possibility* that the jury would lessen the verdict of first degree murder." (Emphasis supplied.)

The disregard of the Courts of Appeals and of the District Courts concerning the rule relating to motions for new trial on grounds of newly discovered evidence, should be stopped by this Court. The Eighth Circuit's error in applying a rule inconsistent with the views of this Court should be corrected.

IV. The Johnson Act Prohibits The Shipment of Gambling Devices In Interstate Commerce. It Requires Those Making Such Shipments To File Reports Thereof Which Serve No Purpose And Have No Use, Other Than To Disclose Violations of The Act. The Act Thus Compels Violators To Disclose Evidence of Their Violations And Is Unconstitutional As Being Violative Of The Fifth Amendment.

Section 2 of the Johnson Act prohibits transportation of gambling devices in interstate commerce except to a state which exempts itself or its subdivision by state law. Section 3 requires every manufacturer and dealer in gambling devices to register his business and name annually and to file detailed information monthly as to each device sold and delivered during the preceding month.

In compliance with the requirements of Section 3, defendant Mayflower Distributing Company filed with the Attorney General of the United States reports of its sales and deliveries of gambling devices. (R. 155-57, 203)

Defendants Mayflower Distributing Company and Herman Paster, president of Mayflower, moved to suppress the records and reports filed by Mayflower upon the ground that the government's use of evidence which defendant had been compelled to file with the government, violated defendants' privilege against self-incrimination. (R. 18-19) The motion to suppress was denied. (R. 19-20) At the trial of this cause, the government introduced into evidence, over defendants' objections, reports filed by Mayflower with the Attorney General. (R. 155-57)

The registration provisions of the Johnson Act were ostensibly designed to make effective and enforceable the prohibition against the interstate shipment of gambling devices. In fact, however, reports filed pursuant to the requirements of the Act have no use whatever except to disclose violations of the Act and as evidence against the violator.

The Johnson Act is not a revenue measure. It is not a regulatory measure. It prohibits certain movements in interstate commerce—nothing more. The filing of reports, therefore, has nothing to do with the collection of revenues or with the regulation of gambling devices.

Reports filed pursuant to the Act will be of two kinds: (1) those disclosing lawful transactions—the shipment of gambling devices into a state which has exempted itself from the operation of the Act; (2) those disclosing unlawful transactions—the shipment of gambling devices into a state which has not so exempted itself. (The Act has no application to intrastate transactions. *U. S.* v. *Five Gambling Devices,* 346 U.S. 441.

With reports showing the shipment of gambling devices to states exempt from the Act, the government has no concern. Such shipments are lawful. No tax is payable in connection with the shipments. The filing of information showing shipment to an exempt state does no more than report to the Attorney General a shipment over which he has no jurisdiction whatever. But reports showing shipment to a state which has not exempted itself from the Act disclose the commission of a crime. The reports have no other use. They serve no other purpose.

None questions Congressional power to bar gambling devices from interstate commerce. But the Johnson Act does more than bar such devices from interstate commerce. It declares shipments to non-exempt states to be a crime—and demands that those who ship to such states report their crime.

If the filing of reports were ancillary to a revenue measure, the reports might be justified as a proper exercise of Congressional taxing power even though an incident to such an exercise of the taxing power is the disclosure of criminal acts. The reports might be similarly justified if they were necessary for the regulation of interstate shipments. But the Johnson Act does not regulate and it does not tax. It differs from all other Congressional acts, in this: it prohibits specified acts—and then demands that reports be filed *which have no use or purpose other than disclosure of the performance of the forbidden acts.* In this respect, the Johnson Act may well be unique.

Enforcement of the Act is undoubtedly facilitated by the filing of reports pursuant to Section 3, since those who violate must report their violations. But the reports have no purpose or use other than disclosure of violations. The Johnson Act therefore violates the provisions of the Fifth Amendment against self-incrimination and is unconstitutional.* The rule of *U. S.* v. *Wilson*, 322 U.S. 694 should be limited to those cases where the incriminating documents are filed pursuant to a valid regulatory act or to a valid revenue act. Here there is neither. The Wilson case should not be extended so as to deny the protection of the Fifth Amendment to a corporation and its officers who have been compelled to file reports which have no purpose or use except as evidence of their criminal acts.

---

* Justice Black, with Justice Douglas concurring, suggested in *U. S.* v. *Five Gambling Devices, supra*, "Holding that the Act requires reports of interstate sales would raise a serious constitutional question. The Act makes it a crime to transport gambling devices in interstate commerce. Consequently, requiring monthly reports of sales and deliveries made by an interstate dealer would require him to make monthly reports of his own crimes. The Fifth Amendment provides that no person shall be compelled 'to be a witness against himself.' "

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

1. Article I, Section 8, Clause 3 of the Constitution reads as follows:

> "The Congress shall have power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

2. The Johnson Act (15 USC (Supp V, §§ 1171-1178, 64 Stat., 1134 et seq.) reads as follows:

> "§ 1171. Definitions
>
> As used in this chapter—
>
> (a) The term "gambling device" means—
>
> (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> (2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; or
>
> (3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.
>
> (b) The term "State" includes Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam.
>
> (c) The term "possession of the United States" means any possession of the United States which is not named in subsection (b) of this section.

"§ 1172. Transportation of gambling devices as unlawful; exceptions; authority of Federal Trade Commission

It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided,* That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

Nothing in this chapter shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act."

"§ 1173. Registration of manufacturers and dealers; filing of inventory and sales and delivery records monthly; sales of unassembled devices; illegal sales or deliveries

Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places

of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this chapter, every manufacturer or dealer shall mark and number each gambling device so that it is individualy identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries."

"§ 1174. Labeling and marking of shipping packages

All gambling devices, and all packages containing any such, when shipped or transported shall be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the package may be readily ascertained on an inspection of the outside of the article or package."

"§ 1175. Specific jurisdictions within which manufacturing, repairing, selling, possession, etc., prohibited

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18.

"§ 1176. Penalties

Whoever violates any of the provisions of section 1172-1174 or 1175 of this title shall be fined not more than $5,000 or imprisoned not more than two years, or both".

"§ 1177. Confiscation of gambling devices and means of transportation; laws governing

Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof: *Provided,* That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws

shall be performed with respect to seizures and forfeitures of gambling devices under this chapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

§ 1178. Separability: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 151

SAMUEL GEORGE NILVA, ALBERT GARDNER, MAYFLOWER DISTRIBUTING CO., HERMAN PASTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 339–354) is reported at 212 F. 2d 115.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1954 (R. 354). On May 19, 1954, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark to and including June 18, 1954 (R. 357). On that day the petition was filed. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether Section 2 of the Johnson Act which makes it unlawful to transport any gambling device in interstate commerce, except to a state which has enacted a law exempting the state or a part thereof from such prohibition, is an unconstitutional delegation of federal power to the states.

2. Whether reports of deliveries of gambling devices, previously filed by the corporate petitioner with the Attorney General pursuant to Section 3 of the Johnson Act, should have been suppressed on the ground that the statute constituted a violation of the Fifth Amendment.

3. Whether the district court properly overruled petitioners' motion for a new trial on the ground of newly discovered evidence.

STATUTE INVOLVED

The Act of January 2, 1951, 64 Stat. 1134 (15 U. S. C. 1171–1177), provides in pertinent part as follows:

> SEC. 2. It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in

any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

* * * * *

SEC. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number

each gambling device so that it is individually identifiable. In case of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

* * * * *

SEC. 6. Whoever violates any of the provisions of sections 2, 3, 4, or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both

STATEMENT

On September 19, 1952, a two-count indictment was returned, the first count of which charged petitioners Nilva, Gardner and The Mayflower Distributing Co. with the illegal transportation in interstate commerce of 38 slot machines on or about March 2, 1951, in violation of 15 U. S. C. 1172, and the second count of which charged peti-

tioners Nilva, Gardner and Paster with conspiring so to transport the same slot machines (R. 1–4). After trial by jury petitioner Nilva was found guilty under both counts; petitioner Gardner was found guilty under count 1, and not guilty under count 2; petitioner Mayflower Distributing Co. was found guilty under count 1; and petitioner Paster was found guilty under count 2 (R. 226).[1] The Court of Appeals unanimously affirmed the judgment (R. 354–355).

The evidence in support of the convictions of the petitioners may be summarized as follows:

The petitioner Mayflower Distributing Company is a Minnesota corporation whose principal office is in St. Paul, Minnesota (R. 27, 198). Petitioner Paster was, during the relevant period, its president, and petitioner Nilva its vice president (R. 27).

About January 16, 1951, the Government witness Carleton called the Mayflower Distributing Co., at St. Paul (R. 110, 151; Govt. Ex. 27) and talked first with Nilva and then with Paster (R. 32, 93, 121). Paster told Carleton that he was interested in buying any used equipment such as consoles and slot machines that could be had at

[1] Petitioner Nilva was given concurrent sentences of imprisonment of one year and one day on each of the two counts; petitioner Gardner was sentenced to six months imprisonment; petitioner Paster was sentenced to one year and one day; and petitioner Mayflower Distributing Company was fined $5,000 (R. 231).

a very low price (R. 32).[2] Carleton contacted three operators at Davenport, Iowa, and attached a list of available machines to a letter dated February 4, 1951, which he addressed to petitioner Paster (R. 32–34, 91–93, 102–105; Def. Ex. 8). In this letter (which together with the list was admitted in evidence as Defendant's Ex. B; R. 91), Carleton asked petitioner Paster to allow him to negotiate the sale, and asked Paster to quote the prices he would pay.

About the middle of February 1951 Carleton received a letter signed by Paster telling him (R. 48) "* * * to get on the ball and get some slot machines lined up from clubs that Mayflower Distributing Company could buy, purchase—cheap price * * *." Carleton received this letter at his home, and after reading it, gave it to his wife who also read it (R. 49).[3] Carleton's wife

[2] The Johnson Act, *supra*, on which the instant indictment is founded was enacted on January 2, 1951.

[3] On the trial Carleton testified that although he did not know the present whereabouts of this letter he remembered "vividly" that it was signed by Paster (R. 39–40), that he had placed it on a credenza in his living room R. 40, 43), and that he had showed it to his brother (R. 41). Carleton was allowed to testify as to its contents after an extensive foundation was laid by government counsel (R. 34–48). This testimony was all corroborated by Carleton's wife (R. 123–136). Carleton's inability to remember first the date of this letter (R. 243–250), and later the fact that he had received it at all (R. 263–312) was the basis for the defense motion for a new trial on the ground of newly discovered evidence (R. 240–259), denied by the court after requestioning Carleton at considerable length (R. 310).

testified that she remembered the letter, that it was received about two weeks before the slot machines were picked up, that it was one page long, that its envelope was marked with the return address of the Mayflower Distributing Company, that it was placed on a credenza in her home, and that she thought it had been subsequently burned by mistake. She remembered that in the letter Paster asked Carleton to (R. 125) "* * * give top priority to getting these machines lined up * * *", and that it was signed by Paster whose signature she recognized (R. 125–126).

Carleton contacted various operators and clubs in the area of Davenport, Iowa, and called petitioner Nilva in St. Paul to tell him that he had approximately seventy machines available for him (R. 49–51, 110). He also talked with Paster by telephone. When Carleton expressed fear over being implicated in "anything that would come up over this stuff", Paster assured Carleton that Nilva would make all the arrangements and that all he had to do was locate the machines and furnish the names of those who wanted to dispose of them (R. 51–52, 151; Govt. Ex. 31).

On February 28, 1951, petitioner Nilva came to Davenport, Iowa, and discussed with Carleton arrangements for purchasing and picking up the slot machines (R. 52–53). Nilva called Paster that evening and on the following day called Mayflower and Paster with respect to obtaining

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money and making arrangements for the transportation of machines (R. 54–58, 179; see also Govt. Exs. 32, 35, R. 151–152). On March 1, Carleton and Nilva arranged for the purchase of machines from the American Legion and the 40 & 8 Club (R. 58, 110, 138–141, 143–145).

On March 2, 1951, Carleton and Nilva went to the American Legion Club and found petitioner Gardner, a truck driver for Mayflower, who had brought a rented truck down from St. Paul, Minnesota, to pick up the machines (R. 59–60, 187). Seven slot machines were then loaded on the truck by Gardner and Nilva (R. 59, 175). Gardner, Nilva and Carleton then drove over to a warehouse in Rock Island, Illinois, where they picked up 21 additional slot machines also belonging to the American Legion Club. These 28 machines were purchased at the rate of $35.00 per machine or a total of $980.00 (R. 59–60, 138–139, 148–149, 175; Govt. Exs. 11, 12). Ten additional machines owned by the 40 & 8 Club, which were also stored in Rock Island, Illinois, were purchased and loaded on the truck (R. 60, 146, 175). After this, Nilva called Paster in Milwaukee, Wisconsin, and gave him a full report on the slot machines purchased and of the route he was going to take back to St. Paul. Paster also talked with Carleton and congratulated him on his part in the transaction (R. 64–65, 152; Govt. Ex. 39). Nilva also called the office of Mayflower

to make a report "on the deal" (R. 66, 152; Govt. Ex. 37).

Gardner and Nilva then drove the truck back to St. Paul, Minnesota, through Illinois (R. 175, 188).

ARGUMENT

1. The petitioners contend (Pet. pp. 4–12) that Section 2 of the Johnson Act (15 U. S. C. 1172) is an unconstitutional delegation of the federal commerce power because it provides that the prohibition against interstate transportation of gambling devices shall not apply when a state shall have enacted a statute exempting itself from the federal law.

It is well established that Congress may ban from interstate commerce articles which are made illegal by the internal law of the state of destination or of origin. *Lottery Case,* 188 U. S. 321, 361–362; *Brooks* v. *United States,* 267 U. S. 432, 436–437; *Whitfield* v. *Ohio,* 297 U. S. 431; *Kentucky Whip and Collar Co.* v. *Illinois Central Railroad Co.,* 299 U. S. 334; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 147; *Powell* v. *United States Cartridge Co.,* 339 U. S. 497, 509–510, fn. 12. Through such exercise of its own delegated power the Federal Government can prevent interstate commerce from becoming the instrument of state law evasion, and avoid the resultant burden on interstate commerce. Cf. *Kentucky Whip and Collar Co.* v. *Illinois Central Railroad Co., supra* (299 U. S. at pp. 341, 347);

The Lottery Case, supra (188 U. S. at p. 357); *In re Rahrer,* 140 U. S. 545. The fact that a federal prohibition is made to depend on the internal policy of the state of destination, and that the state can, by its own legislative action, end the prohibition by declaring its policy to be different, constitutes no infirmity. This Court so held in *Clark Distilling Co.* v. *Western Maryland Ry. Co.,* 242 U. S. 311, wherein it was contended that the Webb-Kenyon Act, which prohibited the shipment of liquors in interstate commerce "to be received, possessed, sold, or in any manner used," in violation of the law of the destination state, was unconstitutional. In addressing itself to analogous arguments that the act illegally delegated federal power to the states, and that it was not of uniform applicability, this Court said (242 U. S. at pp. 326–327):

> The argument as to delegation to the States rests upon a mere misconception. It is true the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply. * * *
>
> So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its pro-

> visions into play—that its provisions apply to all the States—so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself. But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States. In view of the conceded power on the part of Congress to prohibit the movement of intoxicants in interstate commerce, we cannot admit that because it did not exert its authority to the full limit, but simply regulated to the extent of permitting the prohibitions in one State to prevent the use of interstate commerce to ship liquor from another State, Congress exceeded its authority to regulate.

See also *Kentucky Whip and Collar Co.* v. *Illinois Railroad Co., supra* (299 U. S. 334) in which the Court similarly sustained the constitutionality of the Ashurst-Summers Act which prohibited the transportation of goods made by convict labor where the goods were intended to be received, possessed, sold, or used in violation of the laws of the state of destination.

The petitioners argue, however, that all of these cases deal with the valid exercise by the States of their own police power, in connection

with which the federal interstate commerce power is used as a support (Pet. p. 6). They would distinguish the provisions of the Johnson Act here in question because the exemptions are to be enacted as exemptions rather than as regulation of local activity. The petitioners assert that while federal control of interstate commerce may be utilized to support state police power, Congress may not delegate control over interstate commerce as such to the states (Pet. p. 9). The fallacy in this argument is the assumption that the Constitution imposes an artificial limitation on Congress so that it may condition its regulation of interstate commerce with respect to certain particular types of state action, but not others. There is no basis in the cases for such a distinction. In *Gibbons* v. *Ogden*, 9 Wheat. 1, Chief Justice Marshall stated at page 196:

> This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

And the lawfulness of a delegation of the power was upheld in *Currin* v. *Wallace*, 306 U. S. 1. With respect to delegation to the states, this Court has said in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, at 769:

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the

> states to regulate the commerce in a manner which would otherwise not be permissible, * * * or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.

And finally this Court has held that "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." *International Shoe Co.* v. *Washington,* 326 U. S. 310, 315. A corollary of this proposition is that the Federal Government may, instead of exhausting its total power to ban the transportation of a generally prohibited article of commerce, restrict the operation of the ban to those states which do not, because of a contrary state policy, seek exemption from its operation.

2. Petitioners Mayflower and Paster moved before trial to suppress as evidence reports theretofore filed by the Mayflower Company with the Attorney General pursuant to Section 3 of the Act, claiming that the requirements of Section 3 violated the privilege against self-incrimination (R. 18–19). They now assign as error the denial of such motion (R. 19–22) and the admission of the reports in evidence (R. 155–157).

The lack of merit in the contention is evident. The privilege does not extend to records required by law to be kept. *Wilson* v. *United States,* 221 U. S. 361; *Shapiro* v. *United States,* 335 U. S.

1, 6–19. Moreover, a corporation has no standing to assert the privilege, nor have its officers acting on its behalf. *United States* v. *White,* 322 U. S. 694; *Wilson* v. *United States,* 221 U. S. 361, 380. Since there was no claim of privilege made at the time the records were submitted to the Attorney General (cf. *United States* v. *Sullivan,* 274 U. S. 259), any privilege, even had it existed as to such records, was clearly waived. *Rogers* v. *United States,* 340 U. S. 367, 370–371. For all these reasons, therefore, the issue presented as to the validity of Section 3 is not here involved.

3. After judgment was entered in the instant case, petitioners brought the government witness Carleton into the chambers of the trial judge for the purpose of informing the court that he could no longer remember the date on which he had received a letter from petitioner Paster, which on the trial he testified he received about the middle of February 1951. He told the judge that the letter might have been received in 1950 instead of 1951 (R. 243–251). On the basis of this, petitioners filed a motion for a new trial on the ground of newly discovered evidence (R. 238–243, 251–258). A hearing was held on the motion (R. 258–312) at which the gist of Carleton's testimony (R. 263–312) was that he could no longer remember receiving the letter. The trial court after interrogating Carleton at some length denied this motion (R. 312).

Petitioner's assertion (Pet. p. 12–14) that the court improperly intimidated Carleton in questioning him at the hearing is not supported by the record. When read in context, it is clear that the remarks of the court were to seek out the truth of what appeared to be a possible fraud being perpetrated on the court.

On the trial of this case Carleton had described the missing letter with precision, but he forgot the date he received it shortly after the trial. At the hearing he kept vacillating and it was not clear what his position was regarding the letter. One circumstance in particular justifiably excited the suspicion of the court. There had been testimony on the trial that petitioner Paster owed Carleton the sum of $10,000. The court indicated that this suggested to him the possibility that the witness might have some ulterior motive in forgetting the facts concerning the letter (R. 311). Under these circumstances the remarks of the court suggesting the possibility of perjury in the light of the inconsistency in the testimony certainly did not constitute any error of which these petitioners can complain. The court was, on the hearing of the motion, the arbiter of the issue involved, and he was not compelled to abstain from active participation in the interrogation, or to withhold fair comment on the testimony adduced.

Petitioners also contend that the district court erred in not granting a new trial on the ground of newly discovered evidence, and in applying the wrong standard as a basis for the denial (Pet. pp. 15–16). We agree with the court below that (R. 349) "A perusal of this record makes it extremely difficult to determine what this alleged newly discovered evidence was." The fact that Carleton failed or refused to remember the facts concerning a letter that he had testified about on the trial does not constitute newly discovered evidence. He did not recant in his previous testimony (cf. *United States* v. *Johnson*, 327 U. S. 106, 111) and it is difficult to see how his subsequent lack of memory could constitute a basis for voiding the judgment based on such overwhelming evidence. Even if the letter were critical to the case (which it certainly was not), all of the essential facts concerning it had been testified to on the trial by Carleton's wife who had previously read it and knew its contents and the approximate date that it had been received. Under any standard of sufficiency there has been no showing of proof which approaches that necessary to show that the court abused its discretion in overruling the motion.

One of the requisites for the granting of a new trial on the ground of newly discovered evidence is that the evidence must be so material that it would probably produce a different verdict if the new trial were granted. *United States* v. *On*

Lee, 201 F. 2d 722 (C. A. 2), certiorari denied, 345 U. S. 936; *Thompson* v. *United States*, 188 F. 2d 652 (C. A. D. C.). This Court's statement in *Griffin* v. *United States*, 336 U. S. 704, on which petitioners rely (Pet. 15) announces no different rule. There was no abuse of discretion in the denial of the motion in the instant case.

CONCLUSION

The decision of the Court of Appeals is clearly correct and no conflict of decisions exists. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 151

SAMUEL GEORGE NILVA, ALBERT GARDNER, MAYFLOWER DISTRIBUTING CO., HERMAN PASTER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*.

BRIEF OF PETITIONERS IN REPLY TO OPPOSITION TO CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 151

SAMUEL GEORGE NILVA, ALBERT GARDNER, MAYFLOWER DISTRIBUTING CO., HERMAN PASTER, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF PETITIONERS IN REPLY TO OPPOSITION TO CERTIORARI

I.

The Attempted Delegation by Congress of Its Power to Regulate Interstate Commerce in the Johnson Act Is Unconstitutional.

Respondent has attempted in its brief to reply to petitioners' demonstration that the states do not possess and cannot receive power to determine whether a federal penal law governing interstate commerce shall apply within a state. Respondent claims that the states may receive such power when it is delegated to them by Congress from its

totality of power over interstate commerce. Respondent argues that Congress has delegated a portion of this power to the states by the Johnson Act. Its theory is that because Congress' power over this subject is complete and exclusive, such power must necessarily include the power to delegate it. Thus, respondent asserts the remarkable proposition that any power given exclusively to Congress by the Constitution may be delegated by Congress to any extent because of this very completeness and exclusiveness of its possession. The age-old prohibition against delegation exists no longer, in respondent's view, for any power that Congress exclusively possesses by virtue of the Constitution may be delegated by it without limitation.

Such a proposition has never found support from this Court. It has been consistently refuted. It is difficult to determine the origin of the respondent's theory or any logical basis for it. A few random quotations from cases which hold differently, are cited in its support.

Respondent's heavy reliance on *Gibbons* v. *Ogden*, 9 Wheat. 1, is particularly inappropriate. While that case is undoubtedly authority for the principle that the power of Congress over interstate commerce, "like all others vested in Congress, is complete in itself, may be exercised by Congress to its utmost extent, and acknowledges no limitations" (Resp. Br. p. 9), neither that quotation nor any other portion of the case suggests that such power may be delegated by Congress. The operative word in this context is "*exercise*". But to "*exercise*" the power is not to *delegate* it, for the very paragraph from which the quotation is taken holds that the exercise of this power is submitted to the sole wisdom of Congress.

> "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse." (p. 197)

The exercise of that "wisdom and the discretion of Congress" cannot be delegated to the states; nor can Congress in the exercise of its wisdom and discretion delegate the power.[1]

If there were any doubt that the power to regulate commerce could not be delegated, Chief Justice Marshall dispelled it in his opinion in the *Gibbons* case when he said: ". . . it may be admitted that Congress cannot give a right to a state in virtue of its own powers." (p. 202) And again: ". . . Congress cannot enable a state to legislate, . . ." (p. 207)

Yet this case has been relied upon by respondent as support for what it claims to be the "fallacy" of petitioners' position. This position as accurately summarized by respondent, is "that while federal control of interstate commerce may be utilized to support state police power, Congress may not delegate control over interstate commerce as such to the states." (Resp. Br. p. 12) Respondent disagrees with this principle on the alleged basis of some fancied assumptions which it claims to perceive, but it is evident from its brief that the simple basis of disagreement lies in respondent's theory that whatever power Congress possesses exclusively it may, therefore, delegate without limitation. Petitioners submit that such powers are non-delegable.

In further effort to establish the novel proposition that Congress may delegate without limitation its powers over interstate commerce, respondent baldly asserts that "the lawfulness of a delegation of the power was upheld in *Currin* v. *Wallace*, 306 U.S. 1." (Resp. Br. 12). Nothing is further from the truth, for not only did the Court hold that "the required referendum does not involve any delegation of legislative authority", but plainly disapproves any such attempt by saying:

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[1] "The subject was intrusted to it, to be dealt with according to its discretion,—not for delegation to others." *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 164.

> "This is not a case where Congress has attempted to abdicate or to transfer to others, the essential legislative functions with which it is vested by the Constitution. Art. I, §§ 1, 8, Cl. 18. See Panama Refining Co. v. Ryan, 293 U.S. 388, 421; A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529, 541, 542, 553."[2] (p. 15)

Southern Pacific Co. v. *Arizona*, 325 U.S. 761, does not, as respondent claims, stand for the power of Congress to delegate to the states its power over interstate commerce. That case held that Arizona's attempt to regulate the length of interstate trains was unconstitutional. The quotation relied upon by respondent at page 13 of its brief, when read in context and in the light of the long history of the commerce clause, is merely a summation of the settled principle that states may make laws in the exercise of their police power which incidentally affect interstate commerce until Congress preempts the field with a comprehensive plan of regulation. The Court neither said nor implied that Congress has the power to delegate to the states its exclusive power over interstate commerce.

Nor does *International Shoe Company* v. *Washington*, 326 U.S. 310, support respondent's proposition. It simply held that a Washington law imposing an unemployment tax was not an unconstitutional burden on interstate commerce. Although an Act of Congress provided that no one should be relieved of such taxes by virtue of being engaged in interstate commerce, that Act was not the source of the states' power to impose such a tax. Taxation is a retained power of the state but the regulation of interstate commerce is not. This was made clear in the very case on

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[2] Respondent was presumably not referring to that aspect of *Currin* v. *Wallace* where "The statute . . . defines the policy of Congress and establishes standards within the framework of which the administrative agent is to supply the details" (p. 18), since that established doctrine is not remotely analogous to the problem here involved.

which respondent initially relies, *Gibbons* v. *Ogden* (pp. 199-200). For there Chief Justice Marshall points out:

> "... In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

Surely, a state does not need, nor can it receive, authority from Congress to impose a non-discriminatory tax on a person or corporation carrying on activities within the state.[3]

The cases cited in support of the proposition quoted by respondent from the *International Shoe* case do not suggest the right of Congress to delegate its power over interstate commerce. For example, the first of these is *Kentucky Whip & Collar* v. *Illinois C. R. Co.*, 299 U.S. 344, which, as demonstrated in the Petition, supports petitioners' position. The other cases are not contrary but only somewhat less apposite.

It is inconceivable that the *International Shoe* case could or should be construed as sweeping authority for the proposition that Congress may abdicate its power over interstate commerce by delegation to the states. That this Court does not consider the case to have the effect of unsettling the established rule against delegation is evident from such later pronouncements as that found in *United States* v. *Public Utilities Commission*, 345 U.S. 295, 304, in which that whole line of cases relied on in the Petition is cited with approval as correctly demarcating the respective spheres

[3] *Van Allen* v. *Assessors* (*Churchill* v. *Utica*), 3 Wall. 573, 585.

of the states and the federal government in respect to that type of problem with which the Johnson Act seeks to deal.

It is clear that Congress may not delegate to the states its power of regulating interstate commerce, and this Act that attempts to do so is unconstitutional.

II.

The Sole Purpose of the Requirement of the Johnson Act for Filing Reports is to Compel Self-Incrimination Which is in Violation of the Fifth Amendment.

Neither *Shapiro* v. *United States,* 335 U.S. 1, nor *Wilson* v. *United States,* 221 U.S. 361, supports the validity of Section 3 of the Johnson Act. The *Shapiro* case explicitly states the principle of that case and of the *Wilson* case (p. 33): "... the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be *suitable information of transactions which are the appropriate subjects of governmental regulation* and the enforcement of restrictions validly established.'" (Emphasis supplied.) But the Johnson Act is not concerned with the keeping of records that furnish suitable information of transactions which are the appropriate subjects of governmental regulation. The Act merely *prohibits* specified acts—and then demands that reports be filed *which have no use or purpose other than disclosure of performance of the forbidden acts!* In this respect, the Johnson Act may well be unique.

In *Shapiro* v. *United States,* 335 U.S. 1, this Court recognized that:

> "there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself."

Surely those limits are exceeded by an enactment which, in effect, declares an act criminal and then demands that the doer of the crime report his offense. No decision of this

Court supports the validity of an act so extravagantly unfair.

Decisions which narrow the protections of the Fifth Amendment should not be favored. The *Shapiro* and *Wilson* cases ought not to extend beyond the facts with which those cases were concerned—the former with records kept pursuant to the intricate and multitudinous regulations required by price control legislation in wartime, and the latter with records kept pursuant to requirements of general corporate law. The Johnson Act is very different. It does not require the filing of records so that regulation may be effective. It requires the filing of records so that the government will not be burdened with the difficult and disagreeable duty of procuring evidence which proves guilt beyond a reasonable doubt. It permits enforcement officers to take their ease while the defendants are compelled by law to confess their crimes. An enactment so abhorrent to the American sense of fair play ought not to be approved by this Court through extension of the *Shapiro* and *Wilson* cases.

The documents in respect of which immunity was sought prejudiced individual defendants as well as the corporate defendant. The rule that a corporation may not assert the privilege of immunity against self-incrimination ought not to be extended to a case where the sole purpose of the requirement of reports is to incriminate, but ought rather to be limited to those cases where documents are filed pursuant to a valid regulatory or revenue act.

Further, many of the documents introduced by the United States related to purely intra-state activities of the defendants. But the Johnson Act does not reach intra-state activities. (*United States* v. *Five Gambling Devices*, 346 U.S. 441.) Therefore, the intra-state reports submitted to the Attorney General were not documents the filing of which was required by law. Defendants properly objected to their introduction in evidence. Their introduction could not be supported by the claim they were corporate or pub-

lic records required in the exercise of Congress' power over interstate commerce and that therefore they were not protected by the Fifth Amendment.

The great personal privilege conferred by the Fifth Amendment ought not to be deemed waived merely because privilege was not claimed when incriminating documents were filed. The liberty of defendants was not then at hazard. Defendants moved to suppress the incriminating documents before trial, and at the trial objected to their introduction into evidence. Nothing more should be required of them.

III.

The Motion for a New Trial Was Improperly Denied.

Respondent wholly fails to meet the contention of the defendants that the interrogation of the witness Carleton by the trial court constituted so extreme a departure from the proper administration of criminal justice as to call for the corrective intervention of this court. (Pet. Brief, pp. 12-14). Respondent describes the witness Carleton as "vacillating" at the hearing and argues that Carleton's lack of memory does not constitute newly discovered evidence justifying the grant of a new trial. This vacillation and uncertainty were the product of the trial court's wrongful treatment of the witness. Such conduct is not conducive to the eliciting of the truth from a witness.

The evil of which defendants complain is not that the trial court commented upon Carleton's testimony, but that the judge attempted to and did in fact influence it. What Carleton said at the hearing is, in a sense, of less significance than what he might have said had he not been intimidated.

But despite the trial court's threats, Carleton did say at the hearing that he could no longer remember receiving the crucial letter (R. 263-312), and this, by the court's admission, was "the big issue in the case." (R. 266) What the jury might then have done is not for the court to speculate upon.

The trial court should have permitted Carleton to have stated the facts, and, applying the rule of *Griffin* v. *United States,* 336 U.S. 704, granted a new trial.

Respondent argues that the *Griffin* case announces a rule "no different" from that applied by many courts of appeal. In *Griffin* v. *United States,* 336 U.S. 704, this Court says that on motion for new trial, a court should not speculate whether a jury would or would not have considered the new evidence as favorable to defendant had that evidence been before it. If the jury *might* have attached significance to the new evidence favorable to defendant, then a new trial should be granted. Justice Murphy expressed the views of the court on this point, in stating that a new trial should be granted if there is a *"reasonable possibility"* that the jury's verdict might be affected by the new evidence. The holdings of the Courts of Appeal and the District Courts are not consistent with the *Griffin* case.

The motion for new trial was based on the letter of February, 1951. Respondent dismisses that letter as non-critical. But the trial court itself, though it denied the motion for new trial, declared that Carleton's receipt of the letter was "the big issue in the case." If the Griffin rule had been applied to the newly discovered evidence, the trial court would have granted the motion for new trial.

CONCLUSION

From the foregoing, it is evident that nothing advanced by the Government in its Opposition to the Petition for Certiorari affects the validity of the reasons set forth in the Petition.

Accordingly, it is respectfully submitted that certiorari should be granted.

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No. 151

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PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners pray that this Court grant rehearing of its order of October 14, 1954, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above-entitled case as prayed for in the petition filed June 18, 1954, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. This Court has never determined the constitutional issue raised in this case—namely, whether Congress may validly delegate to the states its power to decree exemptions from its prohibition of certain items from shipment in interstate commerce. This is an important issue with far-reaching consequences in our federal system. It deserves and demands the fullest consideration possible by this Court.

Section 2 of the Johnson Act (15 U.S.C. § 1172) prohibits the interstate shipment of gambling devices, with the proviso that this prohibition shall not apply when a state shall have enacted a statute exempting itself from the federal law. Congress thus has attempted to give to the state legislatures the power to declare their respective states exempt from this exercise of federal power over interstate commerce. It has, in short, delegated to the states part of its exclusive constitutional power to regulate commerce between the states.

There is no case in the United States Reports justifying or even involving such an abdication of Congressional power over interstate commerce. As noted in the Government's response to the petition for writ of certiorari in this case (pp. 9-13), there are many decisions affirming the unlimited authority of Congress to condition the exercise of its commerce power as it sees fit. Congress can accordingly ban from interstate commerce those articles made illegal by the internal law of the state of destination or origin. But in such cases the constitutional function—that of banning or not banning from interstate commerce—is that of Congress rather than of state legislatures. It is not for the states to lift the federal ban or to declare themselves exempt therefrom; they merely determine the presence or absence of circumstances which Congress has described as the target or subject of federal action.

It would be a contradiction of our basic federal system to recognize a right in the states to declare themselves exempt from the impact of a federal regulation of commerce. Such a declaration is simply not within the ambit of a state's constitutional position. It can only be made by Congress. Indeed, an inherent and non-delegable part of the federal commerce power is the determination of when that power shall or shall not be exercised. The power to regulate commerce necessarily includes the power to determine when not to regulate. It is a power that by its nature cannot be delegated to or exercised by the states.

As stated by this Court in *Pennsylvania* v. *West Virginia*, 262 U.S. 552, 596,

> By the Constitution, Art 1, § 8, cl. 3, the power to regulate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from invidious restraint, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the States have assented to it, all are alike bound by it and all are equally protected by it.

Thus the Johnson Act, in permitting the state legislatures to declare their respective states exempt from federal prohibition of interstate shipment of gambling devices, flagrantly violates the constitutional principle that a state is forbidden to exercise the federal commerce power. If that principle is now to be abandoned, it means that Congress can henceforth permit the states to exempt themselves from any or all federal laws grounded on the commerce clause. Presumably the states could, if Congress willed, declare themselves exempt from the provisions of the Interstate Commerce Act, the Labor-Management Relations Act, the Fair Labor Standards Act, or a host of other such statutes.

But before such a departure from established constitutional principles is sanctioned, this Court should examine the problem more thoroughly. The revolutionary nature of the departure demands an exhaustive consideration of the impact on the fundamental federal-state relationships. Careful lines should be drawn around any appproval of such a scheme as presented by the Johnson Act. To such ends, therefore, the issue presented by this case calls for the considered judgment of this Court.

2. The grave constitutional issue presented by this case is one of inescapable and increasing importance in Johnson Act prosecutions. The Johnson Act is not yet four years old. Prosecutions under it are just beginning to find their way into federal appellate courts. In many of them the

constitutional problem is being raised. And that issue will assume even wider proportions as the enforcement of the Act proceeds.

In view of the seriousness of the issue and the growing importance of it, full-scale review and resolution by this Court are particularly appropriate at this time. By determining the issue in this case, the Court can either (1) declare the statutory scheme constitutional, thereby removing the real doubts about the validity of Johnson Act prosecutions and strengthening the administration of the Act, or (2) declare the statutory scheme unconstitutional, thereby preventing many unjust and unnecessary prosecutions and preserving a fundamental feature of our federal system of government. The fact that the petitioners here are the first to present the constitutional issue to the Court should not prejudice their right to secure this tribunal's considered determination of so substantial a problem.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

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